Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	
	)	

JOINT REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION, CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS, AND INSIGHT COMMUNICATIONS COMPANY, INC.

Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc. (collectively "Joint Cable Commenters") hereby jointly submit their reply comments in the above-captioned rulemaking proceeding.

The initial comments filed in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), together with other pleadings that make up the record in this proceeding, establish conclusively that, as currently implemented by the Commission, the statutory retransmission consent regime is not serving the public interest. Moreover, the words and actions of broadcast networks and executives outside the context of this proceeding contradict their efforts here to shrug off the increased number of threatened and actual disruptions of service, and the rapid escalation of prices that has accompanied the use of such brinksmanship tactics, as temporary "growing pains." Rather, it is clear that the broadcast industry intends, in the words of CBS CEO Les Moonves, to continue indefinitely to use the threat of "going dark" to drive up retransmission costs for the benefit of the national broadcast networks and at the expense of the viewing public.

Because of changes in the competitive landscape that have upset the balance of bargaining power that existed when Congress enacted, and the Commission implemented, the retransmission consent regime, rules that previously may have been in the public interest now are enabling broadcasters to engage in brinksmanship tactics and make unreasonable demands for fees. Consequently, it is both necessary and appropriate for the Commission to adopt targeted regulatory reforms that will ensure that the exercise of retransmission consent is advancing, not threatening, Congress' ultimate goal – preserving the availability of local television for consumers. In particular, the Joint Cable Commenters reiterate their call for the immediate adoption of measures addressing network interference in the retransmission consent process, repealing protectionist exclusivity rules and barring exclusivity agreements that give broadcasters an unfair advantage in retransmission consent negotiations, and restricting anticompetitive joint negotiating practices and evasions of the broadcast local ownership rules. In addition, Joint Cable Commenters join with other parties in urging the Commission to pursue regulatory reforms based on the goals of transparency, non-discrimination, and unbundling.

DISCUSSION

As is clear from the legislative history of the 1992 Cable Act, Congress' ultimate goal in granting broadcasters retransmission consent rights over the use of their over-the-air signals by cable operators and other multichannel video programming distributors ("MVPDs") was to "ensure the universal availability" of local television stations for consumers in the face of competition from non-broadcast cable networks.[1] In other words, consumers, not broadcasters, were intended to be the beneficiaries of retransmission consent. Yet, as is clear from the record in this proceeding, retransmission consent today is being exploited by broadcasters for their own

[1] *See* Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71, at 13 (*citing* 138 Cong. Rec. S643 (Jan. 30, 1992) (statement of Sen. Inouye)) (filed May 27, 2011) ("Joint Cable Commenters' Comments").

private commercial interest without regard for, and at substantial cost to, the interests of the television viewing public.

Simply put, the right of local stations to negotiate over the use of their signals has been hijacked by the major broadcast networks, who are utilizing retransmission consent as a vehicle to force MVPDs to pay additional consideration for access to content that, as a matter of copyright law, already has been licensed to those MVPDs. Moreover, the networks have made it clear that they will not hesitate to pull their affiliation from local stations that balk at their retransmission consent-related demands, even if it means moving that affiliation to a multicast stream that is less widely available to over-the-air viewers or foregoing over-the-air distribution altogether.[2] So much for the goal of "universal availability" of local television signals.

The broadcasters, of course, deny the existence of any problem. According to the broadcasters, retransmission consent still operates the way Congress intended for it to operate.[3] Indeed, in statements to the government, broadcasters routinely deny that retransmission consent is being used as a copyright surrogate, insisting that the former concerns only the value of the broadcast signal and is not at all related to the value of the right to perform the copyrighted content embodied in that signal.[4] As for the growing number of actual and threatened disruptions and the rapidly escalating prices produced by such brinksmanship tactics, the

[2] Joint Cable Commenters' Comments at 11-12.

[3] *See, e.g.,* Comments of Nexstar Broadcasting, Inc., MB Docket No. 10-71, at 13 (filed May 27, 2011); Joint Comments on Behalf of the Named State Broadcasters Associations, MB Docket No. 10-71, at 12 (filed May 27, 2011); Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No. 10-71, at 1-2 (filed May 27, 2011); Comments of the Walt Disney Company, MB Docket No. 10-71, at 8 (filed May 27, 2011).

[4] *See, e.g.,* Statement of David K. Rehr, President and CEO, National Association of Broadcasters, *Hearing on Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses,* U.S. House of Representatives Committee on the Judiciary, at 12 (Feb. 25, 2009) (acknowledging that retransmission consent agreements and copyright licenses "are entirely separate and distinct").

broadcasters wave off concerns about these developments, characterizing them as mere "growing pains" that should be of no concern to the Commission or, presumably, consumers.[5]

However, when the broadcasters are not pleading their case against retransmission consent reform to the government, they present a far different, and much more candid, picture of what retransmission consent has become and what it will be for the indefinite future if the Commission takes no action. One example, cited by several commenters (including Joint Cable Commenters) in their initial comments, is the admission by David Smith, CEO of Sinclair Broadcasting Group, that the pressure for ever-increasing levels of retransmission consent-related consideration will continue "Forever."[6] And more recently, CBS Corporation CEO Les Moonves offered an even starker and more revealing description of how his network views retransmission consent.

Specifically, speaking at a financial industry conference a week after the initial comment deadline in this proceeding, Mr. Moonves stated that his previous prediction that CBS could be garnering $1 billion in annual retransmission consent/reverse compensation fees by 2017 could prove to be "very conservative,"[7] and that, when it comes to retransmission consent, "the sky's the limit."[8] Unabashedly proclaiming that that the power to go dark gives broadcasters "the

[5] John Eggerton, "Carey: Retrans Modifications Could Imperil Free News, Sports, Entertainment," Multichannel News, Nov. 16, 2010 (available at http://www.multichannel.com/article/459947-Carey_Retrans_Modifications_Could_Imperil_Free_News_Sports_Entertainment.php).

[6] Joint Cable Commenters' Comments at 12; *see also* Comments of AT&T, MB Docket No. 10-71, at 9 (filed May 27, 2011); "Retransmission Consent: The Evidence of Market Power," at 2, attached to letter from Steve Pociask, The American Consumer Institute, to Marlene H. Dortch, FCC Secretary, MB Docket No. 10-71 (filed May 17, 2011).

[7] Georg Szalai, "Les Moonves Eyes 'Huge Numbers' for 'Two and a Half Men' Fall Premiere," The Hollywood Reporter, June 2, 2011 (available at http://www.hollywoodreporter.com/news/les-moonves-eyes-huge-numbers-19418).

[8] CableFAX Daily, June 3, 2011, at 2.

ultimate leverage,"[9] Mr. Moonves left no doubt that the bulk of the retransmission consent-related consideration should go to the national networks, not to local stations. As he put it, "[i]f a station is looking at what's really bringing in the money, it's the NFL, it's 'American Idol,' it's 'CSI,' it's the primetime strength. **It's not the local news**…."[10]

Congress was well aware of the existence of the compulsory copyright license granting cable operators the right to publicly perform the content embodied in broadcast signals (including the broadcast content) and sought to preserve the distinction between that previously granted right and the new right conferred on broadcasters regarding the use of their signals.[11] Moreover, both Congress and the broadcast industry itself clearly understood that retransmission consent was not meant to provide a subsidy or other benefits to the national networks, but rather was intended to address the perceived threat to local broadcasting from non-broadcast-owned cable networks.[12] Yet, in today's upside-down retransmission consent environment, Mr. Moonves is able to boast that broadcasting is "kicking butt" and that it is the "smaller cable channels not tied to big content companies" whose survival is being put in doubt by the ability of broadcasters to command higher and higher retransmission consent payments from MVPDs.[13]

---

[9] *Id*.

[10] *Id*. (emphasis added).

[11] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 173 (1993) ("Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules."); *see also* 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code.").

[12] *See* Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, MB Docket No. 10-71, at 8 (filed June 3, 2010). *See also* Joint Cable Commenters' Comments at 7-8.

[13] Les Moonves Insists That Retrans Cash Is Network Driven," Radio & Television Business Report, June 3, 2011 (available at http://www.rbr.com/tv-cable/les-moonves-insists-that-retrans-cash-is-network-driven.html). Mr. Moonves' comments were echoed by Viacom CEO Philippe Dauman, who told the same audience that the ability of larger cable channels and broadcasters to gain retransmission consent fees and tie new networks to existing networks

Mr. Moonves' vision of retransmission consent thus stands in sharp contrast to what Congress intended when it granted broadcast stations retransmission consent rights in their over-the-air signals. Instead of being reinvested in local services and facilities, retransmission consent fees are being used to purchase national network programming and create broadcaster-owned cable networks. Independent cable networks – the supposed threat to local broadcasting that retransmission consent was intended to address – are being squeezed by a lack of resources and shelf space that is attributable to the inflated retransmission consent fees being paid to broadcasters and the use of tying arrangements linking carriage of broadcast stations and broadcaster-owned cable networks. It is, of course, the consumer that ultimately suffers when program diversity suffers.

Nor are Mr. Moonves and CBS alone in their increasingly aggressive efforts to usurp retransmission consent rights for their own benefit and to the detriment not only of MVPD subscribers, but also over-the-air viewers. Joint Cable Commenters' initial comments discussed how Fox was carrying out threats to pull its network affiliation from stations that resisted its retransmission consent-related demands.[14] Just last week, Fox struck again, pulling its affiliation from two Nexstar-owned stations.[15] In each case, the new arrangement places the private interests of Fox above the interests of the television viewing public. For example, in the Springfield, MO DMA, Fox is moving its affiliation from KSFX (owned by Nexstar) to KRBK even though KRBK's over-the-air signal reach is much smaller than that of KSFX. Fox also is moving its affiliation in the Fort Wayne, IN DMA from Nexstar-owned WFFT to a multicast

---

could force MVPDs to drop smaller "niche" networks. Mike Farrell, "Dauman: Higher Fees Could Squeeze Smaller Nets," Multichannel News, June 2, 2011 (available at http://www.multichannel.com/article/469115-Dauman_Higher_Fees_Could_Squeeze_Smaller_Nets.php).

[14] Joint Cable Commenters' Comments at 11-12, 20-21.

[15] Harry A. Jessell, "Koplar Eager for New Life as Fox Affiliate," TVNewsCheck, June 21, 2011 (available at http://www.tvnewscheck.com/article/2011/06/21/52025/koplar-eager-for-new-life-as-fox-affiliate).

stream of WISE, the market's NBC affiliate. The result will be yet another "virtual" Big Four duopoly with enormous and unfair leverage in retransmission consent negotiations. The public gets no benefit from the movement of these affiliations to weaker signals and multicasts or from the creation of duopolies; all that will come of these moves will be reduced over-the-air access and increased demands for retransmission consent fees backed up by the threatened disruption of consumer access to multiple stations.

When the Commission announced that it was commencing a proceeding to consider reforming its retransmission consent rules, some observers suggested that the mere adoption of the NPRM would cause broadcasters "to moderate their license fee requests."[16] But as the preceding discussion of the words and actions of two of the Big Four networks indicates, broadcasters appear utterly undeterred in their pursuit of ever-increasing retransmission consent fees and their use of threats to obtain those fees. If the problems that led the Commission to initiate this proceeding are to be solved, it is going to require more than a pending rulemaking. It is going to require the immediate adoption of specific and meaningful regulatory reforms.

While the Commission has expressed doubts as to its authority to take certain actions to address retransmission consent impasses (doubts that Joint Cable Commenters do not share and that are thoroughly refuted in the record), there are a variety of proposals before the Commission that it clearly has the power to adopt. These include the adoption of rules restricting network interference in the establishment of retransmission consent terms and conditions; the repeal of territorial exclusivity rules that tilt the negotiating table entirely in the direction of the broadcasters by denying MVPDs any alternative source of certain programming; the imposition of limits on exclusivity provisions in broadcast programming and network affiliation agreements;

[16] *See, e.g.*, Sara Jerome, "Analyst: Retrans rulemaking could help pay-TV providers," The Hill, Feb. 28, 2011 (available at http://thehill.com/blogs/hillicon-valley/technology/146409-analyst-retrans-rulemaking-could-help-pay-tv-providers).

and the enforcement of effective ownership-related rules to guard against anticompetitive duopoly control of the retransmission consent rights to more than one station in a market, particularly "virtual duopolies" consisting of two Big Four network affiliates. The Joint Cable Commenters reiterate their support for the adoption of proposals addressing each of these concerns, as set forth more fully in our initial comments.

In addition, Joint Cable Commenters note that Cablevision has proposed a "three-pronged approach to retransmission consent reform" under which broadcasters would be required to charge non-discriminatory and transparent rates for retransmission consent without tying that consent to carriage of other programming or entry into ancillary deals.[17] The Joint Cable Commenters endorse Cablevision's proposal and direct the Commission's attention to the specific proposals in our initial comments for requiring non-discriminatory and transparent rates.[18]

Finally, it is not surprising that the one "reform" that would do nothing to address the structural imbalance that is at the root of the current failure of the retransmission consent regime is the one proposal that has been endorsed by the broadcasters. We refer, of course, to the broadcasters' self-serving "notice" reform proposal. As discussed more fully in Joint Cable Commenters' initial comments, notice reform is needed, but such reform should be designed to reduce consumer confusion and minimize the opportunity for broadcasters to use scare tactics as part of their retransmission consent negotiating strategy.[19] The proposals endorsed by the

[17] Comments of Cablevision Systems Corporation, MB Docket No. 10-71, at 2-3 (filed May 26, 2011).

[18] Joint Cable Commenters' Comments at 22-23, 27-28, 30. Joint Cable Commenters also refer the Commission to our proposal for the establishment of uniform retransmission consent election period and agreement expiration dates. *Id*. at 28-29.

[19] *Id*. at 24-27.

broadcasters would achieve neither of those objectives and should be rejected by the Commission.

CONCLUSION

Joint Cable Commenters have been among those arguing for some time that changes in the competitive environment have unfairly tilted retransmission consent negotiations in favor of the broadcasters. The result is that the retransmission consent regime, as currently implemented by the Commission, is not serving the public interest goals that it was designed to advance and, contrary to Congressional intent, has become a copyright surrogate for the national broadcast networks. By initiating this rulemaking proceeding, the Commission has taken an important first step. Now the Commission needs to finish the task at hand by adopting meaningful reforms that will protect consumers by restoring balance to the retransmission consent marketplace.

Respectfully submitted,

MEDIACOM COMMUNICATIONS CORPORATION, CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS, AND INSIGHT COMMUNICATIONS COMPANY, INC.

By: /s/ Seth A. Davidson
Seth A. Davidson
Micah M. Caldwell

Edwards Angell Palmer & Dodge LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900

Their Attorneys

June 27, 2011